

ORIGINAL

# TRANSCRIPT OF PROCEEDINGS

UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

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In the Matter of:

WICHITA IRON & METALS CORPORATION,  
Respondent.

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:  
: Docket No.  
: TSCA-VII-91-T512  
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JUDGE'S RULING ON MOTION FOR  
PARTIAL ACCELERATED DECISION

Pages 1 thru 18

Washington, D.C.  
June 17, 1993

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ENVIRONMENTAL PROTECTION AGENCY

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JUDGE'S RULING ON MOTION FOR  
PARTIAL ACCELERATED DECISION

Environmental Protection Agency  
401 M Street, S.W., Room 2710B  
Washington, D.C.

Thursday, June 17, 1993

BEFORE:

JON G. LOTIS, Administrative Law Judge

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## P R O C E E D I N G S

[2:02 p.m.]

JUDGE LOTIS: This is Judge Lotis. We will be on the record now.

Would the party that is on this call please identify yourself for the record, and also spell your name, so we can have it in the record.

MR. THOMAS: [Via telephone] I am Rupert Thomas, with the Environmental Protection Agency, Office of Regional Counsel.

JUDGE LOTIS: Thank you very much.

First, some background. This complaint was filed and was dated October 16, 1991. I have before me the following pleadings for consideration: (1) Wichita Iron & Metals Corporation, Inc., motion for partial accelerated decision; (2) complainant's opposition to respondent's for partial accelerated decision, (3) respondent's reply to complainant's opposition to respondent's motion for partial accelerated decision, and (4) complainant's response to respondents' reply to complainant's opposition to respondent's motion for partial accelerated decision.

I would like to hand the reporter and ask that he

copy it into the record at this point, as if read, the order of designation which authorized me to preside in this case.

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[The order of designation referred to follows:]

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of

Wichita Iron and Metals Corp.,  
Inc.,

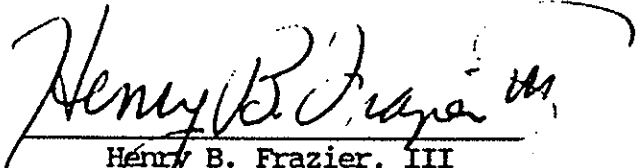
Respondent

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[TSCA] Docket No. VII-91-T-512

ORDER OF REDESIGNATION

Administrative Law Judge Jon G. Lotis, Environmental Protection Agency, Washington, D.C., is hereby redesignated as the Administrative Law Judge to preside in this proceeding under Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), pursuant to Section 22.21(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (40 CFR 22.21(a)).

  
Henry B. Frazier, III  
Chief Administrative Law Judge

Dated: February 10, 1993

Washington, D. C.

JUDGE LOTIS: Also, I ask the reporter copy into the record at this point, as if read, the notice of the ruling today that I am going to be making on this motion.

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[The notice of ruling referred to follows:]

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Wichita Iron & Metals Corp.,  
Inc.,

Respondent

)  
)  
) Docket No. TSCA-VII-91-T-512  
)  
)  
)

NOTICE OF RULING ON RESPONDENT'S MOTION  
FOR PARTIAL ACCELERATED DECISION

This is to serve notice that on June 17, 1993 at 2:00 p.m., I will rule on the Respondent's Motion for Partial Accelerated Decision. The ruling will be made on-the-record with a court reporter and the transcript of the ruling will be available to the parties.

If you wish to hear the ruling via a telephone conference call, please notify my Legal Technician, Stacia Eason at (202) 260-2218, on or before June 16, 1993.



Jon G. Lotis  
Administrative Law Judge

Dated: June 14, 1993  
Washington, D.C.

JUDGE LOTIS: As a preliminary matter, I would like to address Wichita's argument that I should reject EPA's answer to Wichita's motion, because it was filed on April 28, 1993, and it was due by April 19, 1993.

EPA counsel responds by admitting it was late, but said he relied on the July 1, 1992 edition of the Code of Federal Regulations that contained a misprint and had no deadline time prescribed for answers to motions.

Under these circumstances, I view complainant's arguments as a request that I accept it is untimely filing, I find good cause to grant complainant's request and accept its pleadings.

I should also note that I have also and will also accept the pleadings filing by Wichita and EPA as I previously described as 3 and 4. Neither of these pleadings were filed as a matter of right. The agency rules provide for filing of motions and filing of answers to motions.

Beyond that, leave of the Court is required to file additional pleadings. Yet, neither party requested leave to permit their filings. Nonetheless, I will accept all the filings. I find that in this situation the review of all the filings will give me a more complete picture of the situation

this case and will allow me to make a ruling based on a more complete record.

I should advise the parties that in the future they should be aware that pleadings beyond answers to motions shall be subject to rejection by me, if they are not accompanied in advance by a motion for leave showing good cause why additional pleadings should be received.

I should also note at the outset that in the course of consideration of Wichita's motion, I have also granted its motion for leave to file its amended answer, which itself contains arguments that have been considered by me in conjunction with its motion for accelerated decision.

Turning now to the merits of the pleadings, first some background. Wichita Iron & Metals Corporation, Inc. is a Kansas corporation in the business of salvaging metals, primarily scrap iron. Wichita maintains a scrap yard for items which cannot be salvaged. It is this scrap iron which is -- off the record.

[Recess.]

JUDGE LOTIS: I wasn't sure where we were cut off, but let me just start where I think we did.

Wichita maintains a scrap yards for items which

cannot be salvaged. It is this scrap yard which is the subject of inspection and the resulting complaint.

Wichita was inspected by Richard Newby of the Kansas Department of Health and Environment, on April 19, 1993, under the terms of a cooperative agreement with the United States Environmental Protection Agency. Upon visual inspection of an area of scrap metal approximately 20 feet by 30 feet by 50 feet containing 16 large high-voltage PCB capacitors, Newby took one soil sample from directly beneath each of two capacitors, their serial numbers F152129 and F152078, which he later dry-weight tested and found 1,900 PPM and 120,000 PPM PCB's, respectively.

The EPA brought four counts of TSCA violations against Wichita as a result of this inspection. The TSCA section cited is section 15(1), found at 15 U.S.C. 2614(1).

Let me explain the counts first. Count 1 -- and these are the counts coming from the complaint -- under 40 C.F.R. 761.60(a), Wichita had an affirmative duty to dispose of any PCB items in excess of 50 PPM. As of the date of the inspection, Wichita allegedly had not disposed of such PCB's and PCB items.

Count 2, 11 of the 16 capacitors identified by data

nameplate has large, high-voltage PCB capacitors, were allegedly not marked with the stamp of ML, as required by 40 CFR 760.40.

Count 3, the PCB materials, although above PPM, were not stored for disposal in an area protected from rainwater, as prescribed in 40 CFR 761.65(b)(1)(I-5).

Count 4, 11 of the 16 capacitors known to be PCB capacitors by data nameplate were not date-marked as to when they entered storage. 40 CFR 761.65(b)(8) requires such entry date labeling.

Wichita seeks a motion for partial accelerated decision on Counts 1, 3 and 4, claiming that all of 40 CFR 761(d), Storage and Disposal of PCB's, does not apply to Wichita.

The preamble note to 40 CFR 761(d) reads as follows: "Note: This subpart does not require removal of PCB's and PCB items from service and disposal earlier than would normally be the case. However, when PCB and PCB items are removed from service and disposed of, disposal must be undertaken in accordance with these regulations. PCB's (including soils and debris) and PCB items which have been placed in a disposal site are considered to be "in service"

for purposes of the applicability of this subpart. This subpart does not require PCB's and PCB items landfilled prior to February 17, 1978 to be removed for disposal."

"However, if such PCB's or PCB items are removed from the disposal site, they must be disposed of in accordance with this subpart. Other subparts are directed to the manufacture, processing, distribution and commerce and the use of PCB's and may result in some cases in disposal at an earlier date than would otherwise occur."

It is this exemption which Wichita seeks to invoke and which EPA claims is not applicable. EPA maintains that items "landfilled" are distinguishable from those "in service," and that the meaning of the preamble is that only PCB material "landfilled" qualifies for the exemption. I disagree with such a distinction. It is clear that all PCB materials, both "in service" and landfilled are intended to be exempted from the regulation, assuming such materials continually had such status before February 17, 1978.

What remains really here is the intention of the words "have been placed in a disposal site." The preamble clearly begs the question. The question is, is PCB contaminated soil definitionally considered a disposal site

for the applicability of this statute.

It seems appropriate at this time to highlight the regulations language relating to disposals. 40 CFR 761.3 defines "disposal" as "Disposal means intentionally or accidentally to discard, throw away or otherwise complete or terminate the useful life of PCB and PCB items. Disposal includes spills, leaks and other uncontrolled discharges of PCB's, as well as actions related to containing, transporting, destroying, degrading, decontaminating or confining PCB's and PCB items."

40 CFR 761.60(d) states as follows, in pertinent parts: "Spills: (1) spills and other uncontrolled discharges of PCB's at concentrations of 50 PPM or greater constitute the disposal of PCB's; (2) PCB's resulting from the cleanup and removal of spills, leaks or other uncontrolled discharges must be stored and disposed of in accordance with paragraph (a) of this section."

It is clear that "disposals" include spills, and that all spills constitute a disposal. However, the regulation remains silent on exactly what is meant by "a disposal site." There are at least two opposite readings of "disposal site" as it pertains to the exclusion. One

reading, which I will refer to as Proposition 1, is that any "disposal" of PCB's or PCB items creates a "disposal site" directly where a spill occurs. Such contaminated soils are thereby considered "in service" for purposes of this exemption. Therefore, any and all unintentional release of PCB's occurring prior to February 17, 1978 would be exempted from complying with the regulation.

Another reading, which I will refer to as Proposition 2, is a "disposal site" is not simply where there is a "disposal" of PCB's, but, rather, is a place intended for the safe and regulated storage of PCB and PCB items. In other words, uncontrolled discharges amount to an improper disposal and are not "in service" and, hence, are subject to the regulation.

To support Proposition 1, Wichita sites the case of Lamar and Frances Thumm and Holtzman and Silverman Builders, cited as TSCA Case, Region V-C-222, Order issued April 26, 1985.

The Thumm case speaks to the exemption issue only in dicta as the source of the contaminants in that case was not established in the pleadings, and that charges had to be dismissed on that basis. Nonetheless, by extrapolating the

regulatory definition of disposal sites, the Judge concluded that all uncontrolled releases of PCB materials create disposal sites where they occurred. Therefore, all pre-1978 soil contamination is to be considered "in service" and exempt from the regulation.

However, this is not a case of first impression. Although the Thumm case supports Proposition 1, it was, as I noted before, by way of dicta.

More on point is the case referred to as in the matter of Standard Scrap Metal Company, TSCA Appeal No. 87-4, issued August 2, 1990. Another case referred to as In the Matter of City of Detroit Public Lighting Department, et al., TSCA Appeal No. 89-5, February 6, 1991. Standard is a leading case on this issue and speaks exhaustively as to why Proposition 2 is the correct interpretation of subpart (d)'s preamble.

Let me paraphrase some of what Judge McCallum said in his examination of this same question. In the 1978 addendum to the preamble, the EPA stated that, "Soils and debris which have been contaminated with PCB's as a result of a spill or as a result of placement of PCB's in a disposal site prior to the publication date of these regulations shall

be disposed of (1) in an incinerator which complies with Annex 1, or (2) in a chemical waste landfill. PCB containing soil and debris which have been placed in the disposal site are considered to be "in service" for purposes of the applicability of the note."

From this, Judge McCallum reasons that the clear meaning is that contaminated soil must be put in service, that is that it is not in service, unless removed from its source location and actively sent to an approved incinerator or landfill.

Judge McCallum also observed that, under section 761.60(d), uncontrolled discharges are equated with improper disposals. Hence, contaminated soil is considered out of service as of the time of the discharge.

Let's go off the record a moment, while I catch my breath and get a class of water.

[Recess.]

JUDGE LOTIS: Back on the record.

Based on my review of the Standard and City of Detroit cases, it is apparent that the true intention of the prefatory note for subpart (d) was not to grant exemptions for pre-1978 accidental spills, leaks, et cetera, but to

avoid confusion regarding existing EPA approved landfills and disposal sites. But for the exemption, landfills and disposal sites licensed by the EPA to treat or store PCB's would potentially be subject to liability for pre-1978 operation of their facilities.

Since accidental releases are not incorporated in the exemption, the factual issue of when the capacitors in question entered Wichita's scrap yard becomes irrelevant. As this was the basis of respondent's motion for accelerated decision on Counts 1, 3 and 4, I, therefore, deny the motion.

With regard to Count 2, Wichita admits in the pleadings that the 11 capacitors were not marked with an ML stamp, as required by 40 CFR 761.40(a)(3) and, hence, did not include this charge in its motion. Accordingly, all four counts are the subject of the remainder of my discussion.

In Wichita's second defense, they contend that by complying with the regulation, even though after receipt of this complaint, they are absolved of liability and penalties under 40 CFR 761.135. This is an erroneous reading of the provision and such is no defense against the charges brought by the EPA.

The underlying purpose of TSCA is to create an

affirmative duty to clean up spills, leaks, et cetera, of PCB's and PCB items. Such duty begins when PCB's are initially disposed of improperly and continues until cleanup occurs and compliance with section 761. For purposes of EPA's cause of action against Wichita, the applicable time frame is the date of the inspection, that is April 19, 1991.

Wichita's alleged compliance with the regulation occurred not only after the inspection, but after being served with the complaint before me now. It is clear that the purpose of section 761.135 is to encourage all those in violation of the PCB regulations to take matters into their own hands before any EPA intervention. To hold otherwise would be to create an indifference among TSCA violators, which would not only inhibit EPA's effectiveness, but also delay cleanup, which would further damage the environment, the antithesis of the regulations' intention.

Since the exemption of subpart (d) is not applicable to Wichita, and Wichita's delayed cleanup does not absolve them of their liability, I find Wichita liable on all four counts of TSCA violations.

Wichita had filed leave to amend its answer on April 17, 1993, to add two new defenses, a 5-year statute of

limitations defense and the lack of a legal basis for citing Wichita with TSCA violations due to insufficient testing methods, namely, dry weight testing.

Complaining has not filed a response to this motion. Upon review of the motion, I find good cause to grant an amendment to Wichita's answer. The 5-year statute of limitations issue is pending review by the D.C. Circuit Court of Appeals in the 3M v. EPA case, referred to also as Minnesota Mining & Manufacturing, D.C. Circuit No. 92-1126.

In addition, whether dry weight testing is a valid legal basis for finding TSCA violations is also pending review before the Environmental Appeals Board and is now scheduled for oral argument on June 23, 1993 in the case of In Re: CWM Chemical Services, Inc., TSCA-91-II-0213.

Under these circumstances, any implementation of my findings with respect to liability is stayed, pending the outcome of these two cases currently scheduled for review. Within 60 days of the issuance of opinions in each of these cases, the parties shall submit to me brief statements of how those decisions impact on this case.

Also, on June 30, 1993, counsel for the complainant shall submit a statement to me regarding whether the Paperwork

Reduction Act of 1980, at 44 USC 3501, et seq., applies to this proceeding, whether there is as current Office of Management and Budget control number involved in this case, and whether the provisions of section 3512 of the Paperwork Reduction Act are applicable to this case.

Finally, a few housekeeping matters. Section 22.20(a)(2) of the EPA's Consolidated Rules of Practice require that I specify the issues remaining in this case. The issue that remains in this case is the amount of the penalty. This assumes that the Paperwork Reduction Act and also that the cases I referred to on appeal would not affect the outcome of this case.

Also, I believe a reasonable construction of the rules would suggest that the issue date of this decision for purposes of an appeal should be the date when the transcript becomes available to the parties through the EPA's Regional Hearing Clerk. Upon receipt of the transcript, I will review it and, by separate order, if necessary, I will make transcript corrections.

The parties are advised that I am not going to make transcript corrections, unless they are substantive in nature and bear on the substance of my rulings. Upon review of the

transcript, if I am not going to have any transcript corrections, I will put out a notice to that effect and fax it to the parties immediately. Transcript corrections, if any, will be made as soon as possible by way of a separate order and we will fax it to the parties.

I think a fair reading of the rules would suggest that, notwithstanding the transcript corrections, the time for appeal should start running from the time the transcript becomes available prior to correction, unless there are going to be substantial corrections, in which case, I am sure either party could properly ask for additional time to file the appeal.

There being no further matters to be considered, this session is adjourned.

Thank you.

[Whereupon, at 2:32 p.m., the proceedings were adjourned.]